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Solaris Estates Sdn Bhd v Mat Shah bin Safuan

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL
NO J-02(IM)(NCC)-1009-05 OF 2019
MOHAMAD ZABIDIN, AZIZAH NAWAWI AND NANTHA
BALAN JJCA
27 JULY 2020

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Civil Procedure — Appeal — Appeal against decision of High Court — High Court allowed respondent's winding up petition and dismissed appellant's application to strike out winding up petition — Whether appellant could challenge invalidity of consent judgment — Whether consent judgment merged with mode of settlement agreement

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This was an appeal by Solaris Estate Sdn Bhd ('Solaris') against the decision of the learned judge of the High Court ('the judge') in granting an order to wind-up Solaris pursuant to the amended petition ('the petition') that was filed by Mat Shah Safuan ('Mat Shah'). By a decision of the same date, the judge also dismissed an application by Solaris ('encl 12') to strike out the petition. Solaris lodged an appeal against the winding up order via Appeal 1100 and against the dismissal of encl 12 via Appeal 1009. A shareholders agreement ('the SA') between Dato' R Arunasalam ('RA'), Ravichanthiran Ganesan ('RG') and Mat Shah in relation to the sale of a portion of RA's and RG's shares in Solaris Estate Pvt Ltd ('SEPL'). The arrangement between the parties was that payment of the purchase consideration under the SA was to be made to Solaris. Mat Shah instructed a company called Syarikat Pembinaan Kota Laksamana (Melaka) Sdn Bhd ('SPKL') to pay the sum of RM2,950,000 for the initial purchase price for the shares in SEPL. However, the transaction between the parties in relation to the sale of shares in SEPL per the SA, failed. Essentially, Mat Shah wanted a refund of the sum of RM2,950,000 which was paid to Solaris. Thus, Mat Shah and SPKL filed Suit 1501 for the recovery of the sum of RM2,950,000. Suit 1501 ended in a consent judgment being entered on 22 April 2013 between the parties. However, before the consent judgment was recorded, the parties executed a settlement agreement. One Dato' Dr Pang Chow Huat ('Dato Pang') agreed to become the guarantor for the payment of the sum of RM2,950,000 ('the judgment sum') as per the consent judgment ('the personal guarantee'). Despite the settlement agreement, the consent judgment and the personal guarantee, the respective parties, namely, Solaris, RG and Dato Pang failed, neglected and/or refused to make full payment of the judgment sum and/or to comply with the terms of the consent judgment and/or the settlement agreement and/or the personal guarantee. Mat Shah filed a winding up petition against Solaris. Again, the parties went into yet another global

settlement mode. Hence, Solaris, RG and Dato Pang agreed to settle the judgment sum and they executed a mode of settlement agreement ('the MSA') whereby Solaris, RG and Dato Pang again agreed, acknowledged and/or undertake to make full payment of the judgment sum to Mat Shah. However, the terms of the consent judgment, the personal guarantee and/or the MSA were not fulfilled and settled by Solaris, RG and/or Dato Pang. As such, Mat Shah served on Solaris a notice pursuant to s 465(1)(e) of the Companies Act 2016 ('the statutory notice'). 21 days from the date of the statutory notice had lapsed, and Solaris had failed, neglected and/or refused to make full payment of the judgment sum. Consequently, Mat Shah filed the amended petition against Solaris. Solaris filed encl 12 to strike out the petition. The judge dismissed encl 12 and allowed the petition and wound up Solaris. Hence, this appeal.

Held, dismissing Appeals 1100 and 1009:

- (1) Since there was a commonality of purpose which ran through all of the documents ie the settlement agreement, the consent judgment, the personal guarantee and the MSA, they should be treated as forming part of the same transaction. The commonality was that the purpose of these documents was to ensure payment of the judgment sum to Mat Shah by way of some mechanism or other. As such, they should be read together (see para 59).
- (2) The issue in relation to the alleged receivership of SPKL at the time when the consent judgment was recorded, was specifically raised in Suit 153 filed by Solaris and Rakki Shantha Exim Pvt Ltd for an order, inter alia, to set aside the consent judgment on the basis that the consent judgment was null and void. However, the suit had been struck off by the learned judicial commissioner ('JC'). Thus, the issue of SPKL's purported receivership had for all intents and purposes 'merged' with judgment of the JC in Suit 153 and the merger of this issue was underscored by the Court of Appeal's decision which upheld the JC's decision. There was no misdirection on the part of the judge who took the view that the fact that SPKL was under receivership at some point in time prior to 22 April 2013 did not mean that it was under receivership on 22 April 2013. Based on the order of the High Court in Suit 153 and the Court of Appeal's order upholding the High Court's order to strike out Suit 153, the issue of invalidity of the consent judgment due to an alleged (and unproven) receivership was barred by res judicata and it was no longer open to Solaris to resurrect the issue in relation to the alleged invalidity of the consent judgment (see paras 63–65).
- (3) The consent judgment did not merge with the MSA and was not superseded by the MSA. The MSA preserved Mat Shah's rights to enforce the consent judgment in the event there was a default under the MSA. There was no evidence or even a suggestion that the MSA had been

- A complied with. It was not for Solaris to raise the issue that it had not been proven that SPKL had approved the arrangement as per the consent judgment whereby Mat Shah alone was to receive the judgment sum. If at all, it should be SPKL to take issue with this. It was therefore questionable whether Solaris even had the requisite locus standi to raise this as an issue.
- B Any query or issue as regards the position of SPKL should have been taken up prior to the consent judgment being recorded. It was way too late in the day for Solaris to be bringing up these matters. Hence, there was a breach of the MSA, and Mat Shah's right to enforce the consent judgment were at all times preserved under the MSA. And as agreed per the consent judgment, the judgment sum was payable to Mat Shah alone.
- C On that premise, it was clear that under the consent judgment, Solaris was liable to pay the judgment sum to Mat Shah, and Solaris had not established any bona fide dispute in regards to their indebtedness for the amount as stated in the statutory notice which was due and payable by Solaris to Mat Shah. As such, since Solaris failed to pay the said sum, a presumption of their inability to pay their debt (insolvency) arose under s 466(1)(a) of the Companies Act 2016 which entitled the High Court to make a winding up order pursuant to s 465(1)(e) of the Companies Act 2016. Therefore, there was no misdirection or any appealable error which warranted appellate intervention (see paras 66, 68 & 70–75).
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[Bahasa Malaysia summary]

- Ini adalah rayuan oleh Solaris Estate Sdn Bhd ('Solaris') terhadap keputusan hakim Mahkamah Tinggi yang bijaksana ('hakim') dalam memberikan perintah untuk menggulung Solaris menurut petisyen yang dipinda ('petisyen') yang difailkan oleh Mat Shah Safuan ('Mat Shah'). Melalui keputusan pada tarikh yang sama, hakim juga menolak permohonan Solaris ('lampiran 12') untuk membatalkan petisyen tersebut. Solaris mengemukakan rayuan terhadap perintah penggulangan melalui Rayuan 1100 dan terhadap penolakan lampiran 12 melalui Rayuan 1009. Satu perjanjian pemegang saham ('SA') antara Dato' R Arunasalam ('RA'), Ravichanthiran Ganesan ('RG') dan Mat Shah berhubung dengan penjualan sebahagian saham RA dan RG di Solaris Estate Pvt Ltd ('SEPL'). Persetujuan antara kedua pihak adalah bahawa pembayaran pertimbangan pembelian di bawah SA harus dibuat kepada Solaris. Mat Shah mengarahkan sebuah syarikat bernama Syarikat Pembinaan Kota Laksamana (Melaka) Sdn Bhd ('SPKL') untuk membayar sejumlah RM2,950,000 untuk harga pembelian awal bagi saham di SEPL. Walau bagaimanapun, transaksi antara pihak berkenaan dengan penjualan saham dalam SEPL menurut SA, gagal. Secara dasarnya, Mat Shah mahukan pengembalian wang sejumlah RM2,950,000 yang telah dibayar kepada Solaris. Oleh itu, Mat Shah dan SPKL mengemukakan Guaman 1501 untuk mendapatkan semula wang berjumlah RM2,950,000. Guaman 1501 berakhir dengan penghakiman persetujuan yang telah dibuat pada 22 April 2013 antara pihak-pihak. Namun, sebelum penghakiman persetujuan direkodkan,
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pihak-pihak melaksanakan perjanjian penyelesaian. Dato' Dr Pang Chow Huat ('Dato Pang') bersetuju untuk menjadi penjamin untuk pembayaran sejumlah RM2,950,000 ('jumlah penghakiman') mengikut penghakiman persetujuan ('jaminan peribadi'). Walaupun terdapat perjanjian penyelesaian, penghakiman persetujuan dan jaminan peribadi, pihak-pihak, iaitu, Solaris, RG dan Dato Pang gagal, abai dan/atau enggan membuat pembayaran penuh jumlah penghakiman dan/atau mematuhi syarat-syarat penghakiman persetujuan dan/atau perjanjian penyelesaian dan/atau jaminan peribadi. Mat Shah memfailkan petisyen penggulangan terhadap Solaris. Sekali lagi, kedua-dua pihak memasuki kaedah penyelesaian global yang lain. Oleh itu, Solaris, RG dan Dato Pang bersetuju untuk menyelesaikan jumlah penghakiman dan mereka melaksanakan kaedah perjanjian penyelesaian ('MSA') di mana Solaris, RG dan Dato Pang sekali lagi bersetuju, mengakui dan/atau berjanji untuk membuat pembayaran penuh jumlah penghakiman kepada Mat Shah. Walau bagaimanapun, terma penghakiman persetujuan, jaminan peribadi dan/atau MSA tidak dipenuhi dan diselesaikan oleh Solaris, RG dan/atau Dato Pang. Oleh itu, Mat Shah menyerahkan notis kepada Solaris menurut s 465(1)(e) Akta Syarikat 2016 ('notis statutori'). 21 hari dari tarikh notis statutori telah luput, dan Solaris telah gagal, abai dan/atau enggan membayar penuh jumlah penghakiman. Akibatnya, Mat Shah memfailkan petisyen yang dipinda terhadap Solaris. Solaris memfailkan lampiran 12 untuk membatalkan petisyen tersebut. Hakim menolak lampiran 12 dan membenarkan petisyen dan menggulung Solaris. Oleh itu, rayuan ini.

Diputuskan, menolak Rayuan 1100 dan 1009:

- (1) Oleh kerana terdapat persamaan tujuan melalui semua dokumen iaitu perjanjian penyelesaian, penghakiman persetujuan, jaminan pribadi dan MSA, dokumen tersebut harus dianggap sebagai bahagian daripada transaksi yang sama. Persamaannya adalah bahawa tujuan dokumen-dokumen ini adalah untuk memastikan pembayaran jumlah penghakiman kepada Mat Shah melalui beberapa mekanisme atau yang lain. Oleh itu, mereka harus dibaca bersama (lihat perenggan 59).
- (2) Isu yang berkaitan dengan dakwaan penerimaan SPKL pada saat penghakiman persetujuan direkodkan, diajukan secara khusus dalam Guaman 153 yang difailkan oleh Solaris dan Rakki Shantha Exim Pvt Ltd untuk perintah, antara lain, untuk mengetepikan penghakiman persetujuan atas dasar bahawa penghakiman persetujuan adalah batal dan tidak sah. Namun, guaman itu ditolak oleh pesuruhjaya kehakiman yang bijaksana ('JC'). Oleh itu, isu penerimaan SPKL untuk semua maksud dan tujuan 'digabungkan' dengan penghakiman JC dalam Guaman 153 dan penggabungan isu ini ditekankan oleh keputusan Mahkamah Rayuan yang mengesahkan keputusan JC. Tidak ada kesalahan arah pihak hakim yang berpendapat bahawa SPKL berada di bawah penerimaan pada suatu ketika sebelum 22 April 2013 tidak

- A bermaksud bahawa ia berada di bawah penerimaan pada 22 April 2013. Berdasarkan perintah Mahkamah Tinggi dalam Guaman 153 dan perintah Mahkamah Rayuan yang mengesahkan perintah Mahkamah Tinggi untuk membatalkan Guaman 153, isu ketidaksahan penghakiman persetujuan kerana penerimaan yang didakwa (dan tidak terbukti) dihalang oleh res judicata dan Solaris tidak lagi terbuka untuk membangkitkan kembali isu berkaitan dengan dakwaan ketidaksahan penghakiman persetujuan (lihat perenggan 63–65).
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- (3) Penghakiman persetujuan tidak bergabung dengan MSA dan tidak digantikan oleh MSA. MSA mempertahankan hak Mat Shah untuk menguatkuasakan penghakiman persetujuan sekiranya terdapat kegagalan di bawah MSA. Tidak ada bukti atau cadangan bahawa MSA telah dipatuhi. Bukan bagi Solaris untuk membangkitkan isu bahawa tidak terbukti bahawa SPKL telah menyetujui pengaturan tersebut
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- D berdasarkan penghakiman persetujuan di mana Mat Shah sendiri akan menerima jumlah penghakiman. Sekiranya sama sekali, SPKL yang harus menangani isu ini. Oleh itu, adalah diragui sama ada Solaris mempunyai locus standi yang diperlukan untuk membangkitkannya sebagai isu. Segala pertanyaan atau isu mengenai kedudukan SPKL harus ditangani sebelum penghakiman persetujuan direkodkan. Sudah terlalu lambat untuk Solaris membicarakan perkara ini. Oleh itu, terdapat pelanggaran MSA, dan hak Mat Shah untuk menguatkuasakan penghakiman persetujuan sentiasa dipelihara di bawah MSA. Dan seperti yang dipersetujui berdasarkan penghakiman persetujuan, jumlah penghakiman itu harus dibayar kepada Mat Shah sahaja. Atas dasar itu, jelas bahawa di bawah penghakiman persetujuan, Solaris bertanggung jawab untuk membayar jumlah penghakiman kepada Mat Shah, dan Solaris tidak membuktikan pertikaian bona fide berkaitan dengan hutang mereka terhadap jumlah tersebut sebagaimana dinyatakan dalam notis statutori yang terhutang dan harus dibayar oleh Solaris kepada Mat Shah. Dengan itu, oleh kerana Solaris gagal membayar jumlah tersebut, anggapan ketidakmampuan mereka untuk membayar hutang (insolvensi) timbul berdasarkan s 466(1)(a) Akta Syarikat 2016 yang memberi hak kepada Mahkamah Tinggi untuk membuat perintah penggulungan menurut s 465(1)(e) Akta Syarikat 2016. Oleh itu, tidak ada salah arah atau kesalahan yang mewajarkan campur tangan rayuan (lihat perenggan 66, 68 & 70–75).]
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Cases referred to

- I *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189; [1995] 3 CLJ 783, SC (refd)
Glamour Green Sdn Bhd v Ambank Bhd & Ors and another appeal [2006] MLJU 649; [2007] 3 CLJ 413; [2007] 2 AMR 521, CA (refd)
Kamil Azman bin Abdul Razak & Ors v Amanah Raya Bhd & Ors [2019] 4 MLJ

726; [2019] 6 CLJ 419; [2019] 1 LNS 613, FC (refd)
*Mohd Kamal bin Omar v United Overseas Bank (M) Bhd and other
appeals* [2018] MLJU 600; [2018] 5 CLJ 657, FC (refd)
Tan Geok Lan v La Kuan @ Lian Kuan [2004] 3 MLJ 465; [2004] 2 CLJ
301; [2004] 3 AMR 177, FC (refd)

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Legislation referred to

Rules of Court 2012 O 14A, O 33 r 2
Companies Act 2016 ss 465(1)(e), 466, 466(1)(a)

Appeal from: Winding Up Petition No JA-28NCC-194–10 of 2018 (High
Court, Johor Bahru)

C

*G Ravi (C Siva Sankar and Aida Hasan with him) (G Ravi) for the appellant.
Marlysa Razak (Saphna Ravichandran with her) (Richard Wee Chambers) for the
respondent.*

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Nantha Balan JCA (delivering judgment of the court):

INTRODUCTION

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[1] This is an appeal by Solaris Estate Sdn Bhd (Company No 902657-V) ('Solaris') against the decision of the learned judge of the High Court ('the judge') at Johor Bahru dated 9 May 2019 in granting an order to wind up Solaris pursuant to the amended petition dated 4 October 2018 (encl 4) ('the petition'). The petition was filed by Mat Shah Safuan ('Mat Shah'). By a decision of the same date, the judge also dismissed an application by Solaris (encl 12) to strike out the petition.

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[2] Solaris lodged an appeal against the winding up order via Civil Appeal No J-02(NCC)(A)-1100-06 of 2019 ('Appeal 1100'). Solaris also lodged an appeal against the dismissal of encl 12 (the striking out application) via Civil Appeal No J-02(IM)(NCC)-1009-05 of 2019 ('Appeal 1009').

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[3] On 27 July 2020, we dismissed Appeal 1100 and affirmed the decision of the High Court. In view of our decision to dismiss Appeal 1100, Appeal 1009 became academic and was dismissed accordingly. These are our reasons for dismissing Appeal 1100.

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BACKGROUND FACTS

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[4] The starting point in the chronology of events is the Shareholders Agreement dated 25 June 2010 ('the SA') between Dato' R Arunasalam ('RA'),

- A Ravichanthiran Ganesan ('RG') and Mat Shah in relation to the sale of a portion of RA's and RG's shares in a private limited company known as Solaris Estate Pvt Ltd ('SEPL').
- B [5] According to the SA, RA and RG are 'equal partners' in SEPL and that they were willing to sell 33% of the equity in SEPL to Mat Shah for a consideration of USD4.3m. The payment term was that 10% of the purchase price was payable upon execution of the SA and the balance was to be paid progressively within 30 days from the date of the SA. Hence, upon completion of the sale of the shares in SEPL as per the SA, Mat Shah would end up owning 33% of the shareholding in SEPL, whilst RG would hold 34% and RA 33%.
- C [6] It is stated in the SA that SEPL had entered into a joint venture agreement dated 25 June 2008 with an entity known as Societe Des Transportes Complementaires De Chemins De Fer for the extraction of timber from a Concession Site of Yabassi, in the Republic of Cameroon. Once the timber was harvested, the plan of the joint venture partners was to develop the Concession Site into an oil palm plantation ('the Cameroon project').
- D [7] The sale of the shares in SEPL was to enable Mat Shah to participate and invest in the Cameroon project.
- E [8] The arrangement between the parties, as per RG's communication to Mat Shah, was that payment of the purchase consideration under the SA was to be made to Solaris. According to the evidence, Mat Shah instructed a company called Syarikat Pembinaan Kota Laksamana (Melaka) Sdn Bhd ('SPKL') to pay the sum of RM2,950,000 for the initial purchase price for the shares in SEPL.
- F [9] SPKL was incorporated on 26 July 1978. Mat Shah was a director of SPKL since the date of its incorporation. The issued share capital of SPKL was 15,000,000 shares. Mat Shah owned 10,979,640 shares and his son Mohd Faizal Bin Mat @ Matshah ('Faizal') owned 4,020,360 of the shares. Faizal was an alternate director to Mat Shah. Clearly, SPKL was owned and controlled by Mat Shah.
- G [10] At any rate, Mat Shah was able to and did instruct SPKL to make payment of RM2,950,000, albeit they were not a party to the SA. The said sum of RM2,950,000 was paid in instalments to the account of Solaris. The instalment payments were made on the 10 August 2010, 23 August 2010, 5 October 2010, 27 October 2010, and 17 December 2010. There was no objection from any of the parties that the payment was made via SPKL rather than Mat Shah personally.
- H [11] However, for reasons which are not germane to the issue at hand, the
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transaction between the parties in relation to the sale of shares in SEPL per the SA, failed. Essentially, Mat Shah wanted a refund of the sum of RM2,950,000 which was paid to Solaris.

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[12] Thus, Mat Shah and SPKL filed Kuala Lumpur High Court Suit No 22NCvC-1501-12 of 2012 ('Suit 1501') for the recovery of the sum of RM2,950,000.

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[13] The parties in Suit 1501 were, Mat Shah (as the first plaintiff), SPKL (as second plaintiff), RA (as the first defendant), RG (as the second defendant) and Solaris (as the third defendant). Suit 1501 ended in a consent judgment being entered on 22 April 2013 between the parties. However, before the consent judgment was recorded, the parties executed a settlement agreement dated 28 March 2013.

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[14] The relevant parts of the settlement agreement dated 28 March 2013 ('the settlement agreement') read as:

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WHEREAS:

(A) Ravi G and Dato' Mat Shah together with Dato' R. Arunasalam (hereinafter referred to as Dato' Arunasalam) had entered into a Shareholders Agreement dated 25 June 2010 (hereinafter referred to as 'the Shareholders Agreement') wherein it is stated at Clause E of the Shareholders Agreement that a company known as Solaris Estates Pvt. Ltd. (hereinafter referred to as 'Solaris Estates Pvt. Ltd.') is desirous of including a new partner capable of handling its plantations unit vide collaborations with Felda as the case may be to manage the plantation from development to operations. Dato' Mat Shah had been identified and agreed to be an equal partner to meet the needs of Solaris Estates Pvt. Ltd. and Solaris Estates Pvt. Ltd. had offered 33% of its shares to be held by Dato' Mat Shah.

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(B) It is stated in Clause G of the Shareholders Agreement that Ravi G had agreed to offer their shares which will be 33% or 1/3 of the available shareholding in Solaris Estates Pvt. Ltd. for the price of USD4.3 Million with 10% payable upon execution of the Shareholders Agreement and the balance to be paid progressively within thirty (30) days from the date of the Shareholders Agreement. Ravi G and Dato Mat Shah agreed that the sums payable shall be utilised to meet the operating expenses of Solaris Estates Pvt. Ltd. which approval shall not be unreasonably withheld by any of the them.

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(C) Ravi G, whether individually and/or collectively and/or in their capacity in Solaris Pvt. Ltd., told Dato' Mat Shah to make payment to Solaris Estates Sdn Bhd, a subsidiary of Solaris Pvt. Ltd. which is incorporated in Malaysia.

(D) Dato' Mat Shah then instructed Pembinaan Kota Laksamana (Melaka) Sdn Bhd to make payment to Solaris Estates Sdn Bhd *and to date, Dato' Mat Shah has paid a total sum of RM2,950,000.00 (Ringgit Malaysia Two Million Nine Hundred and Fifty Thousand) (hereinafter referred to as 'the said Paid Sum')* details of which are as follows:

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A	Date	Details of Payment	Payor	Payee	Sum (RM)
B	10.08.2010	Direct Credit Transmission	Pembinaan Kota Laksamana	Solaris Estates Sdn Bhd (HLBB Account No: 001-0046')	100,000.00
C	23.08.2010	Hong Leong Bank Berhad Cheque No: 158282	Pembinaan Kota Laksamana	Solaris Estates Sdn Bhd	500,000.00
D	05.10.2010	Hong Leong Bank Berhad Cheque No: 202459	Pembinaan Kota Laksamana	Solaris Estates Sdn Bhd	850,000.00
D	27.10.2010	Hong Leong Bank Berhad Cheque No: 224804	Pembinaan Kota Laksamana	Solaris Estates Sdn Bhd	1,000,000.00
E	17.12.2010	Hong Leong Bank Berhad Cheque No: 269071	Pembinaan Kota Laksamana	Solaris Estates Sdn Bhd	500,000.00
E	Total				2,950,000.00

(E) Dato' Mat Shah and Pembinaan Kota Laksamana (Melaka) Sdn Bhd filed a civil suit in the High Court of Kuala Lumpur against Ravi G, Dato' Arunasalam and Solaris Estates Sdn Bhd claiming, inter alia, for the refund of the said Paid Sum. The civil suit is registered as Kuala Lumpur High Court Civil Suit No: 22 NCVC-1501-1212012 (hereinafter referred to as 'the said Civil Suit').

(F) On 20 April 2012, Dato' Mat Shah, through his solicitors Messrs Richard Wee & Yip, wrote to Ravi G and Dato' Arunasalam to terminate the Shareholders Agreement

(G) On 19 January 2013, Messrs. Sylvester Groves & Co. through Mr. Subra Paidathally, Dato' Arunasalam and Ravi G met with Dato' Mat Shah and explained the chronology of events and it was agreed upon between the Parties that Dato' Mat Shah is a creditor for the reason(s) cited above and that a Settlement Agreement be set out.

(H) The Parties hereto are desirous of entering a full and final settlement of the said Civil Suit upon the terms and conditions herein contained and the Parties are to record a Consent Judgment pursuant to the said Civil Suit by signing this Settlement Agreement.

...

I 2. THE AMOUNT OWING

2.1 The amount owing under the said Civil Suit is RM2,950,000.00 (Ringgit Malaysia Two Million Nine Hundred Fifty Thousand) only (hereinafter referred to as 'the Amount Owing').

3. TERMS OF PAYMENT

3.1 In pursuance of the above and in consideration of Dato' Mat Shah agreeing to accept the Amount Owing as full and final settlement, the Parties herein hereby agree that the Amount Owing *shall be paid to Dato' Mat Shah* in the following manner:

- (a) *Solaris Estates Sdn Bhd undertakes to pay to Dato' Mat Shah the Amount Owing in the sum of RM2,950,000.00* (Ringgit Malaysia Two Million Nine Hundred Fifty Thousand) being the settlement sum for the said Civil Suit;
- (b) Upon execution of this Settlement Agreement, Solaris Estates Sdn Bhd *shall pay the Amount Owing to DATO' MAT SHAH BIN SAFUAN by way of cheque or Telegraphic Transfer on or before 31 December 2013.*
- (c) Upon receipt of the Amount Owing, Dato' Mat Shah and Pembinaan Kota Laksamana (Melaka) Sdn Bhd shall issue a written confirmation that there are no further claims against Dato' Arunasalam, Ravi G and Solaris Estates Sdn Bhd.

4. DEFAULT OF PAYMENT

4.1 *If Solaris Estates Sdn Bhd fails or defaults* in the payment of any sum of money whatsoever and howsoever, due and payable on its due date, as stipulated in Clause 3, whether formally demanded or not, *then Dato' Mat Shah shall be entitled to:*

- a) *To demand, by giving a written notice to Solaris Estates Sdn Bhd and/or Ravi G for the full payment of or the entire outstanding balance of the Amount Owing, as the case may be, within fourteen (14) days from the date of the written notice, together with continuing interests imposed thereon at the rate of 5% (five percentum) per annum on the Amount Owing or the outstanding balance of the Amount Owing as the case may be, from the date of default till full realization;*
- b) *If Solaris Estates Sdn Bhd and/or Ravi G fails or defaults to comply with the said written notice within the stipulated time period, the Amount Owing shall be due and payable by Solaris Estates Sdn Bhd, and/or Ravi G to Dato' Mat Shah, whether formally demanded or not, less whatever sums that have been paid pursuant to Clause 3.1, with continuing interests thereon at the rate of 5% (five percentum) per annum on the Amount Owing from the expiration of the stipulated time period in Clause 4.1 (i) till full realization. (Emphasis added.)*

[15] Next, the terms of the consent judgment dated 22 April 2013 (recorded in Suit 1501) ('the consent judgment') were as follows:

... Defendan-Defendan hendaklah membayar kepada Plaintiff-Plaintif jumlah sebanyak RM2,950,000.00 (Ringgit Malaysia Dua Juta Sembilan Ratus Lima Puluh Ribu) sahaja sebagai penyelesaian penuh dan muktamad tindakan ini atas terma-terma dan syarat-syarat, inter alia, seperti berikut:-

- 1) *Defendan Ketiga hendaklah membayar wang berjumlah RM2,950,000-00*

- A** (*Ringgit Malaysia Dua Juta Sembilan Ratus Lima Puluh Ribu*) tersebut kepada Plaintiff Pertama melalui cek atau pindahan telegrafik (Telegraphic Transfer) pada atau sebelum 31 Disember 2013;
- B** 2) Sekiranya:-
- B** i) Defendan Ketiga ingkar dan/atau gagal membayar Plaintiff Pertama jumlah wang RM2,950,000-00 (*Ringgit Malaysia Dua Juta Sembilan Ratus Lima Puluh ribu*) tersebut; dan/atau
- C** ii) Defendan kedua dan/atau Defendan Ketiga ingkar dan/atau gagal mematuhi mana-mana terma atau syarat Penghakiman Persetujuan ini, maka keseluruhan jumlah wang seperti dituntut oleh Plaintiff-Plaintif di dalam Saman dan Pernyataan Tuntutan tindakan ini atau mana-mana bahagian daripadanya yang masih terhutang dan kena bayar pada ketika itu perlu dibayar oleh Defendan-Defendan kepada Plaintiff-Plaintif dengan serta-merta bersama dengan faedah pada kadar 5% setahun bersama dengan
- D** kos;
- 3) tiada perintah mengenai kos; dan
- DAN* tindakan ini ditarik balik terhadap Defendan Pertama dengan kebebasan untuk memfailkan semula. (Emphasis added.)
- E** [16] The sum of RM2,950,000 referred to in the consent judgment shall be referred to as the 'the judgment sum'. On 6 February 2014, one Dato' Dr Pang Chow Huat ('Dato Pang') agreed to become the guarantor for the payment of the judgment sum as per the consent judgment.
- F** [17] The letter of guarantee dated 6 February 2014 ('the personal guarantee') which was given by Dato Pang read as follows:
- RECITALS
- G** Pursuant to the Consent Judgment dated 22 April 2013 for Kuala Lumpur High Court Civil Suit No: 22 NCVC-1501-12/2012 (hereinafter referred to as 'the said Civil Suit'), it was adjudged that pursuant to the Settlement Agreement dated 28 March 2013 between DATO' MAT SHAH BIN SAFUAN (NRIC No: 470406105707), RAVICHANTHIRAN A/L GANESAN (NRIC No: 621221055649) and SOLARIS ESTATES SDN BHD (Company NO:902657V)
- H** (hereinafter referred to as 'the said Settlement Agreement') who are the 1st Plaintiff, 2nd Defendant and 3rd Defendant respectively in the said Civil Suit, the Defendants in the said Civil Suit shall pay the Plaintiffs in the said Civil Suit a sum of RM2,950,000.00 (*Ringgit Malaysia Two Million Nine Hundred Fifty Thousand*) (hereinafter referred to as 'the Amount Owing') as full and final settlement of the said Civil Suit based on terms and conditions, inter alia, which are
- I** as follows:
- 1) the 3rd Defendant in the said Civil Suit shall pay the Amount Owing to the 1st Plaintiff in the said Civil Suit by way of cheque or Telegraphic Transfer on or before 31 December 2013;

2) In the event:-

- i) the 3rd Defendant in the said Civil Suit fails and/or refuses and/or defaults in paying the 1st Plaintiff in the said Civil Suit, the Amount Owing; and/or
- ii) the 2nd Defendant in the said Civil Suit and/or the 3rd Defendant in the said Civil Suit fails and/or refuses to obey any of the terms and/or conditions in the said Settlement Agreement;

then the entire outstanding sum as claimed by the Plaintiffs in the Summons and Statement of Claim of the said Civil Suit or part thereof which remains due and payable at that time is to be paid by the Defendants in the said Civil Suit to the plaintiffs in the said Civil Suit forthwith together with interest at the rate of 5% per annum together with costs.

A copy of the Consent Judgment dated 22 April 2013 for the said Civil Suit which encloses the said Settlement Agreement is attached hereto as 'Enclosure 1'.

2. DEFINITIONS AND INTERPRETATIONS

2.2 'the Creditor' is DATO' MAT SHAH BIN SAPUAN (NRIC No: 470406105707) of 24th Floor, Menara Safuan, No. 80, Jalan Ampang, 50450 Kuala Lumpur.

3. AGREEMENT

NOW IT IS HEREBY AGREED as follows:

3.1 I, Dato' Pang acknowledge that the Debtors presently owe the Creditor the sum of RM2,950,000.00 (Ringgit Malaysia Two Million Nine Hundred Fifty Thousand) being the Amount Owing.

3.2 I, Dato' Pang, am ready, *willing and able to pay the Amount Owing to the Creditor* on behalf of the Debtors, and guarantee to the creditor payment of the Amount Owing before the Due Date.

4.2 Upon receipt of the Amount Owing to the satisfaction of the Creditor, the Creditor and Pembinaan Kota Laksamana (Melaka) Sdn Bhd (2nd Plaintiff in the said Civil Suit) shall issue a written confirmation that there are no further claims against the Debtors.

4.4 This agreement does not release the Debtors from their liability under the said Civil Suit and the said Settlement Agreement. The Creditor reserves his rights and remedies under the said Civil Suit and the said Settlement Agreement. The Creditor's right and remedies under the said Civil Suit and the said Settlement Agreement shall not be limited, changed or impaired by any of the terms of this agreement.

[18] Despite the settlement agreement, the consent judgment and the personal guarantee, the respective parties, namely, Solaris, RG and Dato Pang failed, neglected and/or refused to make full payment of the judgment sum and/or to comply with the terms of the consent judgment and/or the settlement agreement and/or the personal guarantee.

A [19] On 22 July 2015, Mat Shah filed a winding up petition against Solaris via Winding Up Petition No 28NCC-148-07 of 2015. Mat Shah had also commenced other legal proceedings against the parties. Again, the parties went into yet another global settlement mode. Hence, Solaris, RG and Dato Pang agreed to settle the judgment sum and they executed a Mode of settlement agreement dated 11 August 2016 ('the MSA') whereby Solaris, RG and Dato Pang again agreed, acknowledged and/or undertake to make full payment of the judgment sum to Mat Shah. The related legal proceedings against the parties are as mentioned in the Recitals to the MSA.

C [20] The Recitals to the MSA were worded as follows:

E. To date, the total amount of the said Judgment Sum which remains due and payable has not been paid by Ravi G and/or Solaris Estates and/or Dato' Pang to Dato' Mat Shah.

D F. Dato' Mat Shah and Pembinaan Kota Laksamana (Melaka) Sdn Bhd filed a Bankruptcy proceeding against Ravi G in the High Court of Seremban under Bankruptcy No. 29NCC-1858-12/2014,

E G. Dato' Mat Shah filed a civil suit against Dato' Pang in the High Court of Johor Bahru under Civil Suit No. 22NCVC-213-12/2014 for breach of the said Personal Guarantee.

F H. Ravi G had filed a civil suit against Dato' Mat Shah and Pembinaan Kota Laksamana (Melaka) Sdn Bhd in the High Court of Kuala Lumpur under Civil Suit No. 22NCC-1511-03/2015 to set aside the said Consent Judgment by which, on this date of this agreement, is pending an appeal by Ravi G in the Court of Appeal under Civil Appeal No.W-02(IM)(NCC)-1151-09/2015.

G I. Solaris Estates had filed a civil suit against Dato' Arunasalam, Dato' Mat Shah, Pembinaan Kota Laksamana (Melaka) Sdn Bhd and Ravi G in the High Court of Kuala Lumpur under Civil Suit No. 22NCVC-206-03/2015 to set aside the said Consent Judgment.

H J. Dato' Mat Shah had filed a Winding-Up Petition against Solaris Estates in the High Court of Johor Bahru under Winding Up Petition No. 28NCC-148-07/2015.

I K. The Parties hereto have agreed to enter into this Mode of Settlement Agreement (hereinafter referred to as 'this Agreement') and to resolve all of the abovementioned suits as stated at paragraphs F, G, H, I and J, in the following manner hereinafter contained.

L. For the purposes of this Agreement, all terms in the said Settlement Agreement, the said Consent Judgment and the said Personal Guarantee, shall, at all times, remain enforceable and valid.

[21] The operative provisions of the MSA read as:

NOW THIS AGREEMENT WITNESSES AS FOLLOWS:-

1. THE SETTLEMENT SUM

- 1.1. *The amount owing to Dato' Mat Shah as per the Settlement Sum is RM2,950,000-00 (Ringgit Malaysia Two Million Nine Hundred and Filly Thousand) only.* **A**
2. TERMS OF PAYMENT
- 2.1. Ravi G, Solaris Estates and Dato' Pang, as full and final settlement of the matters between the Parties, have agreed to pay the Settlement Sum in the following manner:- **B**
- ...
- b. In the event the scheme of share transfer/payment in Clause 2.1(a) above is not to the satisfaction of Dato' Mat Shah, Dato' Mat Shah shall retain the right to call upon a one lump sum payment of the Settlement Sum deducting any part payment thereof. **C**
- DEFAULT OF PAYMENT
- 3.1. *If Solaris Estates, Ravi G and/or Dato' Pang fails or defaults in the payment of any sum of money whatsoever and howsoever, due and payable on its due date, and/or in the issuance of the Preference Shares to Dato' Mat Shah and/or to buy back the Preference Shares from Dato' Mat Shah within the prescribed time as stated in Clause 2 above, whether formally demanded or not, then Dato' Mat Shah shall be entitled to the following:* **D**
- i. *To demand, by giving a written notice to Solaris Estates, Ravi G and/or Dato' Pang for the full payment of or the entire outstanding balance of the Settlement Sum, as the case may be, within fourteen (14) days from the date of the written notice;* **E**
 - ii. *If Solaris Estates, Ravi G and/or Dato' Pang fail or default to comply with the said written notice within the stipulated time period, the Settlement Sum shall be due and payable by Solaris Estates and/or Ravi G and/or Dato' Pang to Dato' Mat Shah, together with continuing interests imposed thereon at the rate of 5% (five percentum) per annum on the Settlement Sum or the outstanding balance of the Settlement Sum as the case may be, from the date of default till full realization, whether formally demanded or not, less whatever sums that have been paid pursuant to Clause 2.1;* **F**
G
 - iii. *If Solaris Estates, Ravi G and/or Dato' Pang fail or default to comply with this Agreement, it shall amount to an immediate breach of this Agreement, thus, Dato' Mat Shah shall have the right to enforce the said Settlement Agreement, the said Consent Judgment, the said Personal Guarantee and/or this Agreement hereafter. (Emphasis added.)* **H**
- [22] However, the terms of the consent judgment, the personal guarantee and/or the MSA were not fulfilled and settled by Solaris, RG and/or Dato Pang. As such, on 5 April 2018, Mat Shah's solicitors served on Solaris a notice dated 4 April 2018 pursuant to s 465(1)(e) of the Companies Act 2016 ('the statutory notice'). **I**
- [23] The statutory notice read as:

A Re: The sum of RM2,950,000.00 which is due and owing to Mat Shah Bin Safuan (NRIC No. 470406-10-5707), to date.

B *TAKE NOTICE* that we, Mah Weng Kwai & Associates, as solicitors for Mat Shah Bin Safuan (NRIC NO. 470406-10-5707) ('Mat Shah bin Safuan') do hereby demand from you payment of the sum of *RM3,682,035.00* (Ringgit Malaysia Three Million Six Hundred Eighty Two Thousand Thirty Five only) which is made up as follows:

a) Principal sum owed by Solaris Estates Sdn Bhd RM2,950,000.00 (Company No.: 902657-V) to Mat Shah bin Safuan pursuant to the Consent Judgment dated 22.04.2013.

C c) Default of payment's interest at the rate of 5% per annum on the Judgment Sum stated in the consent Judgment dated 22.04.2013.

NOTE: RM731,035.00

D [as at 22.04.2013 up till 04.04.2018 over the period of 1809 days] (daily interest is about RM404.11/day)

TOTAL OUSTANDING AMOUNT RM3,681,035.00

and you are required to pay the aforesaid sum due or to secure or compound for it to the reasonable satisfaction of Mat Shah bin Safuan within twenty one (21) days from the date hereof. A copy of the Consent Judgment dated 22.04.2013 is enclosed herewith by way of service on you as the Debtor.

E *AND FURTHER TAKE NOTICE* that in the event you fail, omit, refuse or neglect to make payment of the said sum of *RM3,681,035.00* within the stipulated time you shall be deemed to be unable to pay the debt pursuant to Section 465(1)(e) of the Companies Act 2016 and appropriate actions will be taken for the Winding-up of Solaris Estates Sdn Bhd.

F Dated this 4th April 2018.

G [24] 21 days from the date of the statutory notice had lapsed, and Solaris had failed, neglected and/or refused to make full payment of the judgment sum. Consequently, Mat Shah filed the amended petition against Solaris.

[25] The amended petition dated 4 October 2018 read as:

H 5. The Respondent is indebted to your Petitioner for the sum of RM3,681,035.00 (Ringgit Malaysia Three Million Six Hundred Eighty One Thousand and Thirty Five Only) ('the said Outstanding Sum'), due and owing to your Petitioner pursuant to a Consent Judgment dated 22.04.2013 ('the said Consent Judgment') vide Kuala Lumpur High Court Civil Suit No. 22NCVC-1501-12/2012, a Settlement Agreement dated 28.03.2013 ('the said Settlement Agreement') and/or Mode of Settlement Agreement dated 11.08.2016 ('the said Mode of Settlement Agreement') as at 04.04.2018.

I DETAILS OF THE OUTSTANDING SUM

Outstanding Principal Sum	RM2,950,000.00
Interest at 5% per annum	

[from 22.04.2013 till 04.04.2018 over the RM731,035.00
period of 1809 days]

TOTAL OUSTANDING AMOUNT

(as at 4.4.2018)

RM3,681,035.00

A

6. The Petitioner had served a Notice under Section 465(1)(e) and Section 466(1) of the Companies Act 2016 (hereinafter referred to as 'the Statutory Demand') dated 04.04.2018 to the Respondent.

B

A copy of the Statutory Demand dated 04.04.2018, Statutory Declaration by Ahmad Noor Aiery bin Ahmad Kamal dated 28.08.2018 and Statutory Declaration by Shamsuddin bin Ali dated 28.08.2018 are now produced, annexed herewith and marked as 'TSMS-3' collectively:

C

7. Your Petitioner through its solicitors, Messrs MahWengkwai & Associates had on or about 10.04.2018 served on the registered address and on or about 11.04.2018 on the business address of the Respondent by AR Registered Post, the aforementioned Statutory Demand demanding payment of the said Judgment Sum within twenty one (21) days from the date of service of the Statutory Demand.

D

A copy of a letter dated 4.4.2018 and acknowledged AR Registered cards are now produced, annexed herewith and marked as 'TSMS-4'.

8. Over twenty one (21) days have now lapsed since your Petitioner through their solicitors served the Statutory Demand but the Respondent has failed, refused and/or neglected to pay the said outstanding sum or to secure or compound for it to the reasonable satisfaction of your Petitioner and is therefore unable to pay its debts.

E

9. In the circumstances, the Respondent is insolvent, unable to pay its debts and it is just and equitable for the Respondent to be wound up by this Honourable Court.

F

[26] As mentioned earlier, Solaris filed an application (encl 12) to strike out the petition. They also filed an affidavit in opposition to the petition. The affidavit was by Tan Bon Kiat (affirmed on 28 November 2018). Tan Bon Kiat averred as follow:

G

10. The Petitioner at the material time instructed the company, Syarikat Pembinaan Kota Laksamana (Melaka) Sdn. Bhd. to pay the required funds for the investment in the Cameroon project and the company had pumped the monies to the Respondent. The payments were made via instalments to the Respondent and the total amount invested by the petitioner was for the sum of RM2,950,000.00. The payments were made by Syarikat Pembinaan Kota Laksamana (Melaka) Sdn. Bhd. to the Respondent on the 10.8.2010, 23.8.2010, 5.10.2010, 27.10.2010 and 17.2.2010.

H

11. The Respondent was at all material times being paid by Syarikat Pembinaan Kota Laksamana (Melaka) Sdn. Bhd. for the funds and at all material times, the payments were not made by the Petitioner.

I

...

26. The Respondent contends that the said Consent Judgment was void at the material time and the company, Syarikat Pembinaan Kota Laksamana (Melaka)

- A Sdn. Bhd. was in the state of receivership at the time the Consent Judgment was recorded at Kuala Lumpur High Court on 22.4.2013.
- ...
- B 27. The Petitioner till to date has failed to produce any resolution from the company, Syarikat Pembinaan Kota Laksamana (Melaka) Sdn. Bhd. that the petitioner is entitled to demand and receive the sum of RM2,950,000.00 which was actually funded by the company and not by the Petitioner. The Petitioner has failed to date to produce any resolution to show that he is entitled to be refunded with the sum of RM2,950,000.00 which was paid by the company and not by the Petitioner.
- C 28. I state herein that this Winding Up Petition is to wind-up the Respondent which was alleged to have been owing the Petitioner the sum of RM3,681,035.00 based on the consent Judgment dated 22.4.2013, the Settlement Agreement dated 28.3.2013 ('the Settlement Agreement') and/or the Mode of Settlement Agreement dated 11.8.2016 ('the said Mode of Settlement Agreement').
- D 29. I state herein, the said Consent Judgment which is relied on by the Petitioner has been preceded by the Mode of Settlement Agreement which was executed by the Parties on the 11.8.2016. The Petitioner has refused to abide by the Mode of Settlement Agreement which was entered into by the Parties wherein the Parties had agreed to a settlement which was then submitted to Johor Bahru High Court. I
- E contend herein that the Winding-Up Petition ought to be struck out as the said Consent Judgment which was relied on by the Petitioner has no basis as the Parties had agreed to be bound by the Mode of Settlement Agreement dated 11.8.2016. (the Mode of Settlement Agreement has been exhibited in the Winding-Up Petition filed by the Petitioner and marked as 'Exhibit TNS-2')
- F ...
- G 34. I state herein that all these matters are pending and therefore, there is no issue of insolvency of the Respondent. The Respondent had time and again attempted to settle the matter and requested for documents from the Petitioner to enable the Respondent to do the necessary as the Company, Syarikat Pembinaan Kota Laksamana (Melaka) Sdn. Bhd. had disbursed the sum to the Respondent as an advance and then now, the Petitioner is demanding the refund of the sums of RM2,950,000.00 (which was advanced by Syarikat Pembinaan Kota Laksamana (Melaka) Sdn. Bhd.) but now the Petitioner is seeking for the Respondent to pay the said sum to him as an individual.
- H 35. I state herein that the Respondent and its solicitors had requested for the Warrant to Act from Syarikat Pembinaan Kota Laksamana (Melaka) Sdn. Bhd. since way back in 2012 and this had led to the discovery that the company, Syarikat Pembinaan Kota Laksamana (Melaka) Sdn. Bhd. had issued funds to the Respondent when at the material time, Syarikat Pembinaan Kota Laksamana [sic] (Melaka) Sdn. Bhd. was under receivership and this was not disclosed by the
- I Petitioner to the Respondent.
36. I state herein that the Petitioner's current lawyers are the same ones that drew up the Mode of Settlement Agreement dated 11.8.2016. The solicitors were Mr. Richard Wee and Cik Marlysa Razak who had negotiated on the terms and drafted the Mode of Settlement Agreement dated 11.8.2016.

37. I state herein that it would be a collateral abuse to shut down the Respondent as the Respondent had Instituted a claim against the Petitioner and Syarikat Pembinaan Kota Laksamana (Melaka) Sdn. Bhd. and this is not an issue that is frivolous but goes to the root of the matter. **A**
38. I ask herein why the fact that Syarikat Pembinaan Kota Laksamana (Melaka) Sdn. Bhd. was under receivership at the material time not disclosed at all to the Respondent? **B**
39. I ask herein why was the Petitioner reluctant to produce the resolution from the company, Syarikat Pembinaan Kota Laksamana (Melaka) Sdn. Bhd. authorising him to receive the refund of the monies from the Respondent. **C**
40. I ask the Petitioner herein, can the Petitioner record a Consent Judgment with a Third Party without a resolution from the company, Syarikat Pembinaan Kota Laksamana (Melaka) Sdn Bhd? (Emphasis added.) **D**
- [27] Mat Shah responded via an affidavit affirmed on 13 December 2018. He averred as follows: **D**
19. ... I also verily believe that the Mode of Settlement Agreement did not and does not prevail over the consent Judgment nor would the Mode of Settlement Agreement render the Consent Judgment baseless, as indicated by the Respondent. The Respondent is put on strict proof to prove their averments. **E**
20. The Mode of Settlement Agreement duly executed by the relevant parties affirms the validity and the enforceability of the Consent Judgment as well as the Settlement Agreement against the Respondent. I humbly refer specifically to Recital L of the Mode of Settlement Agreement. **F**
- L. For the purposes of this Agreement, all terms in the said Settlement Agreement, the said Consent Judgment, and the said Personal Guarantee, shall, at all times, remain enforceable and valid. **F**
21. Nevertheless, I verily state that I am entitled to enforce the Consent Judgment, the Settlement Agreement and/or the Mode of Settlement Agreement against the Respondent to recover the Judgment Sum as per Clause 3 of the Mode of Settlement Agreement. **G**
- THE HIGH COURT — GROUNDS OF JUDGMENT **H**
- [28] The judge dismissed encl 12 and allowed the petition and wound up Solaris. The judge's reasons for allowing the amended petition (encl 4) and rejecting encl 12 were as follows: **H**
- [6] According to the Respondent it was the Mode of Settlement Agreement which set out the manner in which the outstanding sum was agreed to be paid through the Consent Judgment. Therefore it was the Mode of Settlement Agreement which applied. This effectively meant the Consent Judgment had been preceded by the Mode of Settlement Agreement. **I**

- A** [7] The above ground was without merit. This was because the Mode of Settlement Agreement itself allowed the Petitioner the right to enforce the Consent Judgment upon default in payment. This was evident from the following provisions in the Mode of Settlement Agreement —
- B** Recital L
- ‘For the purposes of this Agreement, all terms in the said Settlement Agreement, the said Consent Judgment and the said Personal Guarantee, shall, at all times, remain enforceable and valid.’
- C** (ii) Clause 2 (b)
- ‘In the event the scheme of share transfer/payment in Clause 2.1(a) above is not to the satisfaction of Dato’ Mat Shah, Dato’ Mat Shah shall retain the right to call upon a one lump sum payment of the Settlement Sum deducting any part payment thereof.’; and
- D** (iii) Clause 3.1 (iii)
- ‘If Solaris Estates, Ravi G and/or Dato’ Pang fall or default to comply with this Agreement, it shall amount to an immediate breach of this Agreement, thus Dato’ Mat Shah shall have the right to enforce the said Settlement Agreement, the said Consent Judgment, the said Personal Guarantee and/or this Agreement, hereafter.’.
- E** ...
- [8] It follows the aforesaid provisions in the Mode Settlement of Agreement has preserved the rights of the Petitioner to enforce the Consent Judgment in the event of a default of the outstanding sum.
- F** [10] On hearing day on 14-4-2019 the Respondent took a different tack to also submit there had been a merger of the Consent Judgment and Mode of Settlement Agreement. It referred to *Tan Geok Lan v La Kuan @ Lian Kuan* [2004] 3 MLJ 465; [2004] 2 CLJ 301 where the Federal Court held at page 311.
- G** [11] In that case, the facts were that the plaintiff had tendered a document described as a consent order where it was informed parties had reached a settlement. It was held at the high court the parties were not bound by that document and that there was no consent order between the parties. It was in that context the Federal Court stated there were two contracts, before the court makes the order and after the order is made, after which there is a merger. Our particular case deals with an instance of an agreement which is the Mode of Settlement Agreement executed after the Consent Judgment was recorded.
- H** [12] There was therefore no merger whereby the Mode of Settlement Agreement allowed for the Petitioner to enforce the Consent Judgment. This is apart from merger not being pleaded.
- I** (b) *PKL under receivership, no resolution from PKL and no solicitor’s warrant to act*
- [13] In paragraph 25 of the affidavit in support it was stated the Consent Judgment was void as PKL was in receivership, there was no PKL resolution (paragraph 26 and 27) and that the Respondent had requested for the warrant to act for PKL since 2012 which the Petitioner has been reluctant to produce (paragraph 35 and 39).

- [14] With regard to PKL being in receivership what was produced were the company search and 2 documents on receiver and manager (R&M) ceasing to act in exhibit A to Affidavit Tambahan Plaintiff-Plaintiff in relation to suit JA-22NCVC-153-07/2018 pursuant to its notice of intention to use such affidavit. Exhibit A did not show PKL was in receivership. The notice by R&M of ceasing to act stated one Lee Tuck Fook had ceased to act on 23-10-1991 and Ramli bin Ibrahim on 25-1-1990. However the notices were dated 26-11-2015. A
- [15] This does not show receivership as at the date of Consent Judgment on 22-4-2013. It also does not support the allegations that PKL disbursed the monies when it was under receivership. In paragraph 10 of the affidavit in support such payments were made between August, October and December 2010. B
- [16] Further there was no requirement in the Mode of Settlement Agreement for the Plaintiff to provide such resolution and/or warrant to act. C
- ...
- [24] It was next contended the statutory demand was premised on the Consent Judgment while the winding up Petition was premised on the Consent Judgment/the Settlement Agreement and/or the Mode Settlement Agreement wherein it was not stated there had been a breach thereof. Since there had been a merger of the Consent Judgment into the Mode Settlement Agreement, the Petitioner could not rely on the Consent Judgment to say there was any outstanding sum. This contention has to fail as the Court had earlier found there was no merger. The Petitioner can indeed rely on the statutory demand duly served which made reference to the failure of the Respondent to comply with the terms of the Consent Judgment. This therefore brings the Respondent of being unable to meet its debts under section 466 of the Act, such that the Respondent be wound up. D
- Conclusion* E
- [25] For the above reasons, the Respondent's application to strike out the winding up petition in enclosure 12 was dismissed and the Petitioner's petition to wind up the Respondent was allowed. F
- [29] Before us, counsel for Solaris took up a few points in support of the appeal. The grounds of appeal that were relied upon by Solaris may be gathered from the memorandum of appeal which reads (in Bahasa Malaysia) as follows: G
- (1) Hakim Mahkamah Tinggi yang bijaksana telah terkhilaf dari segi fakta dan undang-undang apabila membenarkan Perintah Penggulangan dimasukkan terhadap Perayu dan kos sebanyak supaya selanjutnya memerintahkan RM10,000 dibayar oleh Perayu kepada Responden. H
 - (2) Hakim Mahkamah Tinggi yang bijaksana telah terkhilaf dari segi fakta dan undang-undang apabila gagal untuk mengambil kira bahawa 'Mode of Settlement Agreement' bertarikh 11.8.2016 yang dimasuki di antara Perayu, Responden, Dato' Dr. Pang Chow Huat dan Ravichanthiran Ganesan yang sewajarnya dilaksanakan dan bukannya Penghakiman Persetujuan yang dimasuki oleh Responden, Syarikat Pembinaan Kota Laksamana (Melaka) Sdn. Bhd. Arunasalam Ramasamy dan Ravichanthiran Ganesan pada 22.4.2013 di Mahkamah Tinggi Kuala I

- A Lumpur melalui *Guaman Sivil No: 22NCVC-1501-12/2012*.
- (3) Hakim Mahkamah Tinggi yang bijaksana telah terkhilaf dari segi fakta dan undang-undang apabila gagal untuk mengambil kira bahawa Penghakiman Persetujuan bertarikh 22.4.2013 tidak lagi terpakai dan tidak boleh dilaksanakan ataupun dikuatkuasakan memandangkan 'the Mode of Settlement Agreement' bertarikh 11.8.2016 telah memperuntukkan bagaimana Jumlah Penghakiman sebanyak RM2,950,000 akan dibayar.
- B
- (4) Hakim Mahkamah Tinggi yang bijaksana telah terkhilaf dari segi fakta dan undang-undang apabila gagal untuk mengambil kira bahawa 'there was a merger of the consent judgment and the Mode of Settlement Agreement' dan Perayu dan Responden telah memilih untuk memasuki 'Mode of Settlement Agreement' bertarikh 11.8.2016 sebagai melaksanakan Penghakiman Persetujuan bertarikh 22.4.2013.
- C
- (5) Hakim Mahkamah Tinggi yang bijaksana telah terkhilaf dari segi fakta dan undang-undang apabila memutuskan bahawa tidak wujudnya 'merger' kerana 'Mode of Settlement Agreement' bertarikh 11.8.2016 tersebut sendiri membenarkan Responden untuk melaksanakan Penghakiman Persetujuan bertarikh 22.4.2013 dan bahawa isu mengenai 'merger' tersebut tidak diplidkan oleh Perayu pada sepanjang masa yang material.
- D
- (6) Hakim Mahkamah Tinggi yang bijaksana telah terkhilaf dari segi fakta dan undang-undang apabila gagal untuk mengambil kira bahawa Petisyen Penggulangan Terpinda bertarikh 4.10.2018 tersebut adalah 'vague' dan 'ambiguous' kerana tidak langsung menyatakan terdapatnya kemungkiran terhadap Perjanjian Penyelesaian bertarikh 28.3.2013, Penghakiman Persetujuan bertarikh 22.4.2013 dan 'the Mode of Settlement Agreement' bertarikh 11.8.2016 tersebut.
- E
- (7) Hakim Mahkamah Tinggi yang bijaksana telah terkhilaf dari segi fakta dan undang-undang apabila memutuskan bahawa Syarikat Pembinaan Kota Laksamana (Melaka) Sdn. Bhd. tidak berada di dalam keadaan 'receivership' pada masa Penghakiman Persetujuan dimasuki pada 22.4.2013.
- F
- (8) Hakim Mahkamah Tinggi yang bijaksana telah terkhilaf dari segi fakta dan undang-undang apabila gagal untuk mengambil kira bahawa Carian Syarikat bagi Syarikat Pembinaan Kota Laksamana (Melaka) Sdn. Bhd. bertarikh 14.8.2012 menunjukkan bahawa Syarikat Pembinaan Kota Laksamana (Melaka) Sdn. Bhd. telahpun berada di dalam keadaan 'receivership' di mana 'Receivers and Managers' telah dilantik pada 31.10.1989 bagi Syarikat Pembinaan Kota Laksamana (Melaka) Sdn. Bhd. dan Syarikat tersebut masih berada di dalam keadaan 'receivership' sehingga 26.11.2015.
- G
- H
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- (9) Hakim Mahkamah Tinggi yang bijaksana telah terkhilaf dari segi fakta dan undang-undang apabila memutuskan bahawa dokumen-dokumen yang dikemukakan oleh Perayu tentang 'receivership' Syarikat Pembinaan

- Kota Laksamana (Melaka) Sdn. Bhd. tersebut tidak menunjukkan bahawa Syarikat tersebut berada di dalam keadaan 'receivership' semasa Penghakiman Persetujuan dimasuki pada 22.4.2013 dan tidak menyokong hujahan Perayu yang Syarikat Pembinaan Kota Laksamana (Melaka) Sdn. Bhd. telah mengeluarkan wang untuk pinjaman kepada Perayu semasa Syarikat tersebut berada di dalam keadaan 'receivership'. A
- (10) Hakim Mahkamah Tinggi yang bijaksana telah terkhilaf dari segi fakta dan undang-undang apabila memutuskan bahawa tiada sebarang peruntukan di dalam 'Mode of Settlement Agreement' bertarikh 11.8.2016 yang mewajibkan Perayu mengemukakan sebarang resolusi ataupun 'Warrant to Act' Syarikat Pembinaan Kota Laksamana (Melaka) Sdn. Bhd. B
- (11) Hakim Mahkamah Tinggi yang bijaksana telah terkhilaf dari segi fakta dan undang-undang apabila memutuskan bahawa adalah mencukupi untuk Responden bergantung kepada Notis Tuntutan (Statutory Demand) menurut Seksyen 465(1)(e) Akta Syarikat 2016 yang menyatakan kemungkiran ke atas Penghakiman Persetujuan bertarikh 22.4.2013 sahaja tanpa perlu menyatakan terdapatnya kemungkiran terhadap Penghakiman Persetujuan bertarikh [sic] 22.4.2013 dan/atau Settlement Agreement bertarikh 28.3.2013 dan/atau Mode of Settlement Agreement bertarikh 11.8.2016. C
- [30] Counsel argued that under the MSA, it was agreed that the payment of the judgment sum was to be made by way of issuance of shares of Solaris and the subsequent buy back arrangement. He said that it was subsequently discovered that at the material time when the consent judgment was recorded that SPKL was under liquidation. There was no beginning date or default date although the provisions of default were provided in the MSA per cl 3 thereof. D
- [31] On 28 July 2018, Solaris and Rakki Shantha Exim Pvt Ltd filed a claim at Johor Bahru High Court via Suit No JA-22NCvC-153-07 of 2018 ('Suit 153') for an order, inter alia, to set aside the consent judgment on the basis that the consent judgment was null and void as SPKL was in a state of liquidation or receivership when the consent judgment was entered. It was alleged that the receivership status of SPKL was (allegedly) not revealed by Mat Shah (see: paras 25 and 26 of the statement of claim in Suit 153). Thus, prayer (a) of the statement of claim reads as 'Suatu Perintah dibenarkan untuk Penghakiman Persetujuan yang di masuki oleh pihak-pihakpada 22.4.2013 diMahkamah tinggi Kuala lumpur diketepikan'. E
- [32] In Suit 153, Solaris also sought to obtain an order for specific performance of the MSA. However, on application by Mat Shah and SPKL, Suit 153 was struck out by the High Court on 23 December 2018. Solaris lodged an appeal to the Court of Appeal via Court of Appeal Civil Appeal No J-02(IM)(NCvC)-50-01 of 2019 ('Appeal 50'). On 15 August 2019, the F
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- A Court of Appeal dismissed the appeal and affirmed the decision of the High Court. Before us counsel for Solaris said that the Court of Appeal's order was only in relation to the consent judgment and that they were at liberty to re-file a claim for specific performance of the MSA.
- B [33] Thereafter, Solaris filed a fresh suit for specific performance of the MSA via Johor Bahru High Court Suit No JA-22NCvC-206-11 of 2019 ('Suit 206'). Counsel informed us that Suit 206 was pending hearing. In Suit 206 Mat Shah filed an application on 27 January 2020 under O 14A and/or O 33
- C r 2 application and raised the issue as to whether Solaris is entitled to proceed with the MSA and whether Mat Shah is estopped from proceeding with the enforcement of the consent judgment dated 22 April 2013.
- D [34] According to counsel for Solaris, in the present case, the judge erred in law and fact when she failed to consider that the MSA should have been enforced between the parties and not the consent judgment recorded in Suit 1501. In amplification he said that cl 2.1 of the MSA provides the manner as to how the judgment sum was to be settled. He said the MSA had detailed out as to how the judgment sum was to be paid and the consent judgment will only
- E come into force if there is a breach of the MSA and that to-date, there has been no judicial determination that there has been a breach of the MSA.
- [35] Thus, it was submitted for Solaris that the judge erred in allowing the winding up without having considered if there was a breach of the MSA.
- F [36] The judge had also held that the MSA was irrelevant and that it had not merged with the consent judgment. The judge further stated that the MSA had preserved Mat Shah's rights to enforce the consent judgment in the event of a default of the outstanding sum.
- G [37] According to counsel, the critical question is whether the consent judgment had merged with the MSA? Counsel emphasised that the MSA clearly sets out how the payment of the judgment sum was to be made by Solaris to Mat Shah.
- H [38] In particular, the MSA stipulated that in the consent judgment is to be resorted to only in the event of a default or breach in the MSA. Counsel for Solaris said that the MSA has neither been breached nor terminated and that in any event, the enforcement of the MSA was still an issue which was pending
- I before the Johor Bahru High Court in the Suit 206. It was argued that parties had modified the terms of the consent judgment and that the operative contract is the MSA. He referred to the Federal Court's case of *Mohd Kamal bin Omar v United Overseas Bank (M) Bhd and other appeals* [2018] MLJU 600; [2018] 5 CLJ 657 (FC) para [9] and argued that parties had agreed to

modify the terms and manner of the payment of the judgment sum per the MSA. Hence, it was submitted that the MSA took precedence over the consent judgment and that the latter had merged into the MSA.

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[39] Counsel for Solaris also referred to the Federal Court case of *Tan Geok Lan v La Kuan @ Lian Kuan* [2004] 3 MLJ 465; [2004] 2 CLJ 301; [2004] 3 AMR 177 FC, to support his argument that there was a merger between the said consent judgment and the MSA. In *Tan Geok Lan*'s case, the court held that there were two contracts, the first, before the court made the order and the second, after the order was made. The facts in *Tan Geok Lan*'s case were as follows.

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[40] The plaintiffs (the joint-owners of a piece of land) had earlier entered into a joint-venture agreement ('the JVA') with the defendant whereby the latter would develop a part of the land into a complete housing estate within three years thereof. The defendant was unable to perform his part of the JVA within the stipulated time and the plaintiffs gave the defendant notice of their intention to terminate the JVA.

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[41] The land was subsequently sold to a third party and the plaintiffs brought an action in the High Court for a declaration that the JVA had been rescinded, damages for breach of contract and special damages. At the first hearing of the action, counsel for the plaintiffs tendered a document ('encl 37') which he described as a 'consent order' and informed the court that the parties had reached a settlement. The learned judge, however, held that the parties were not bound by encl 37 and that there was no consent order between the parties as she had not made any orders respecting encl 37. In deciding that the action should proceed to trial, the learned judge also held that encl 37 amounted to an attempt by the parties to dictate to the court how it should conduct its proceedings. The said decision of the High Court was upheld by the Court of Appeal. The plaintiffs appealed to the Federal Court. There were two issues before the Federal Court.

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[42] For our purposes, only the first issue is relevant — whether parties in a High Court civil action are bound by the agreement reached between them on the mode and manner of determining the issues which are the subject matter of the proceedings in the trial court. The Federal Court allowed the appeal and held (per Mohd Noor Ahmad FCJ) and held that the agreement on the terms reached between the parties at the interlocutory stage of an action is a contract between the parties and the consent judgment or order arising out of that contract is also a contract between the parties except that the latter is superadded by the command of the court. In short, the Federal Court in *Tan Geok Lan*'s case held that there were two contracts, one, before the court made the order and the second, after the order was made. After the order was made

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A the first contract merged into the second contract. That being the case, short of the order being made, the first contract will have to be separately considered on its binding effect based on incidents of a contract.

B [43] The next complaint that was advanced on behalf of Solaris was that in the amended winding up petition dated 4 October 2018, Mat Shah had taken the position that both the consent judgment and the MSA are applicable whereas in the statutory notice, he stated that only the consent judgment dated 22 April 2013 was applicable. Counsel for Solaris also said that the amended winding up petition did not state that there was a breach of the settlement agreement dated 28 March 2013, or of the consent judgment dated 22 April 2013, or of the MSA. Counsel for Solaris said that the facts as set out in the statutory notice dated 4 April 2018 binds Mat Shah and that he cannot go beyond the allegations stated therein. He said that it was not stated at all in the amended winding up petition that Solaris had breached the consent judgment and the MSA.

E [44] The judge held under paras [18] and [20] of her grounds of judgment that it is undisputed that the statutory notice had been duly served and since the consent judgment is still valid and enforceable and had not been set aside, Solaris was obliged to comply with the terms of the consent judgment requiring payment.

F [45] But counsel for Solaris said that the judge failed to consider that the amended winding up petition dated 4 October 2018 conflicted with the statutory notice issued by Mat Shah on 4 April 2018. The statutory notice was predicated on the consent judgment alone and nowhere was it stated that there was a breach of the settlement agreement, or of the consent judgment or of the MSA.

G [46] It was submitted for Solaris that since there was a merger between the consent judgment and the MSA, Mat Shah cannot say that there was a breach of the consent judgment alone.

H [47] Counsel for Solaris took the position that the demand for the judgment sum due must arise from a breach of the MSA as the consent judgment was merged into the MSA. Since the amended winding up petition did not allege that there was a breach of the MSA, thus the petition ought to be dismissed. As such, it was submitted that s 466 of the Companies Act 2016 is not applicable as the statutory notice issued by Mat Shah on 4 April 2018 was not issued in accordance to the MSA.

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[48] The next point that was canvassed for Solaris was that the judge erred in law and facts in having failed to appreciate the issue that SPKL was in under receivership when the consent judgment was entered between Solaris, Mat Shah and SPKL on 22 April 2013.

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[49] According to counsel, there is also one factor that raised a doubt as to why the judge did not consider the status of SPKL when the consent judgment was entered. He referred to the grounds of judgment which reflected on both the argument on the winding up petition and the application to strike out the winding up petition at para [14]:

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With regard to PKL being in receivership what was produced were the company search and 2 documents on receiver and manager (R & M) ceasing to act in exhibit A to Affidavit Tambahan Plaintiff-Plaintiff in relation to Suit JA-22NCvC-153-07/2018 pursuant to its notice of intention to use such affidavit. Exhibit A did not show PKL was in receivership. The notice by R & M of ceasing to act stated one Lee Tuck Fook had ceased to act on the 23-10-1991 and Ramli Bin Ibrahim on the 25-1-1990. However the notices were dated 26-11-2015.

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[15] This does not show receivership as at the date of Consent Judgment on the 22-4-2013. It also does not support the allegations that PKL had disbursed the monies when it was under receivership. In paragraph 10 of the affidavit in support such payments were made between August, October and December 2010.

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[16] Further, there was no requirement in the Mode of Settlement Agreement for the Plaintiff to provide such resolution and/or warrant to act.

[50] According to counsel, the judge totally ignored that the notice to cease to act as the receiver and manager of SPKL which was dated 26 November 2015 which clearly showed the evidence that SPKL was under receivership prior to 2015 which is prior to when the consent judgment was recorded (22 April 2013). Thus, counsel asked rhetorically — How can this not be considered as sufficient evidence to show the status of receivership of SPKL as at the date of consent judgment? As such, it was contended that the judge erred in concluding that the said document did not show that SPKL was under receivership as at the date of consent judgment.

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[51] In amplification it was alleged that the judge failed to appreciate that there were no directors' resolution approving SPKL to record the consent judgment and neither was there any resolution from the directors of SPKL to allow Mat Shah to take over the benefit of the judgment sum.

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[52] We turn now to the submissions that were made on behalf of Mat Shah. Counsel for Mat Shah referred to paras [11] and [12] of the judge's grounds of judgment and argued that the judge was correct in concluding that the consent judgment was not overtaken by the MSA and that there was no merger of the consent judgment with the MSA.

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A [53] It was contended that the MSA merely preserved the spirit and effectiveness of the consent judgment and did not take precedence over the MSA. Counsel referred to cl 2.1 of the MSA which stipulated the mechanism for settlement of the judgment sum. Counsel emphasised that Solaris undertook and agreed to pay the settlement sum (which is the same as the judgment sum) by issuing the preference shares (with no fixed dividend).

C [54] The preference shares was to be of the value of RM2,950,000 and were to be issued in ten equal monthly tranches of 295,000 shares each at RM1 par value and each tranche shall commence on or before the 25th day of every calendar month. The first tranche of the preference shares was to be issued upon the execution of the MSA and the remaining nine tranches of the preference shares were to be issued on or before the 25th day of every calendar month.

D [55] Thereafter, Solaris was to buy back each tranche of the preference shares from Mat Shah within four to six weeks after the issuance of the preference shares at the value of RM295,000 per tranche, irrespective of its par value or market value. And if Solaris failed or is unable to buy back each tranche of the preference shares from Mat Shah within the time stipulated at cl 2(a)(iii), Ravi G and/or Dato' Pang undertook to purchase from Mat Shah each tranche of the preference shares within five weeks from the expiration of the time period granted to Solaris to purchase the Shares (as stated in cl 2(a)(iii) of the MSA) at the value of RM295,000 per tranche, irrespective of its par value or market value. In the event the scheme of share transfer/payment in cl 2.1(a) is not to the satisfaction of Mat Shah, then he retained the right to call upon a one lump sum payment of the Settlement Sum after deducting any part payment thereof.

G [56] Finally, counsel referred to cl 3.1(iii) of the MSA which stipulated that if there was any default by Solaris, RG and/or Dato' Pang, then that shall constitute an immediate breach of the MSA and Solaris shall have the right to enforce the consent judgment, the MSA and the personal guarantee. Counsel pointed out that it was agreed between the parties as per the terms of the MSA, that in the event of a breach, Mat Shah alone shall be entitled to enforce the consent judgment.

I [57] In amplification it was argued on behalf of Mat Shah that the consent judgment has not been fulfilled for many years. Further, and contrary to what was argued by counsel for Solaris, under cl 2(a)(ii) of the MSA, there was a time line for Solaris to issue the preference shares (in tranches). But Solaris never issued the said preference shares.

[58] Hence, there was non-compliance with the MSA. Counsel argued that there was no merger of the consent judgment with the MSA and that Recital L

and cl 3.1(i)(ii) and (iii) of the MSA expressly preserved Mat Shah's right to enforce the consent judgment. Counsel said that the facts and issues here are different from the case of *Tan Geok Lan*. As such the merger principle per *Tan Geok Lan*'s case is inapplicable.

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OUR DECISION

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[59] At the outset, it is necessary to point out that the documents which are in focus in this appeal, namely, the settlement agreement, the consent judgment (which in law, operates as a contract see *Kamil Azman bin Abdul Razak & Ors v Amanah Raya Bhd & Ors* [2019] 4 MLJ 726; [2019] 6 CLJ 419; [2019] 1 LNS 613 (FC)), the personal guarantee and the MSA, are inextricably linked to one another. As such, they cannot be read in isolation. Now, although these documents were not executed simultaneously, we are of the view that since there is a commonality of purpose which runs through all of them and they should be treated as forming part of the same transaction. The commonality is that the purpose of these documents was to ensure payment of the judgment sum to Mat Shah by way of some mechanism or other. As such, they should be read together. See: *Glamour Green Sdn Bhd v Ambank Bhd & Ors and another appeal* [2006] MLJU 649; [2007] 3 CLJ 413; [2007] 2 AMR 521 (CA).

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[60] We next consider the challenge to the alleged invalidity of the consent judgment. Here, the complaint is that as at the date when the consent judgment was recorded, SPKL was under receivership.

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[61] The judge examined the evidence and was not convinced that SPKL was under receivership as at the date of the consent judgment (22 April 2013). The judge said:

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[14] With regard to PKL being in receivership what was produced were the company search and 2 documents on receiver and manager (R&M) ceasing to act in exhibit A to Affidavit Tambahan Plaintiff-Plaintiff in relation to suit JA-22NCVC-153-07/2018 pursuant to its notice of intention to use such affidavit. Exhibit A did not show PKL was in receivership. The notice by R&M of ceasing to act stated one Lee Tuck Fook had ceased to act on 23-10-1991 and Ramli bin Ibrahim on 25-1-1990. However the notices were dated 26-11-2015.

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[15] This does not show receivership as at the date of Consent Judgment on 22-4-2013. It also does not support the allegations that PKL disbursed the monies when it was under receivership. In paragraph 10 of the affidavit in support such payments were made between August, October and December 2010.

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[16] Further there was no requirement in the Mode of Settlement Agreement for the Plaintiff to provide such resolution and/or warrant to act.

- A [62] It is important to mention one other important point in relation to the challenge to the alleged invalidity of the consent judgment — this challenge was already taken up in Suit 153, which was subsequently struck out by the learned judicial commissioner ('the JC') on 23 December 2018. And the JC's decision was upheld by the Court of Appeal when it dismissed the appeal by
- B Solaris 15 August 2019. Thus, the issue of the alleged invalidity of the consent judgment is barred by *res judicata*.
- C [63] Indeed, in our view, the issue in relation to the alleged receivership of SPKL at the time when the consent judgment was recorded, was specifically raised in Suit 153 and which said suit has since been struck off.
- D [64] Thus, the issue of SPKL's purported receivership has for all intents and purposes 'merged' with judgment of the JC on 23 December 2018 in Suit 153 and the merger of this issue is underscored by the Court of Appeal's decision dated 15 August 2019 which upheld the JC's decision (see: the decision of the Supreme Court in *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189; [1995] 3 CLJ 783 on 'merger' of causes of action and issues).
- E [65] We also see no reason to disagree with the decision of the judge when she opined that there was no evidence that SPKL was under receivership as at 22 April 2013. In our view, there was no misdirection on the part of the judge who took the view that the fact that SPKL was under receivership at some point
- F in time prior to 22 April 2013 did not mean that it was under receivership on 22 April 2013. At any rate, we are convinced that based on the order of the High Court in Suit 153 and the Court of Appeal's order upholding the High Court's order to strike out Suit 153, the issue of invalidity of the consent judgment due to an alleged (and unproven) receivership is barred by *res*
- G *judicata* and it is no longer open to Solaris to resurrect the issue in relation to the alleged invalidity of the consent judgment.
- H [66] As for the issue of the statutory notice being predicated on the consent judgment, we agree with the findings of the judge based on her interpretation of that the MSA, that the consent judgment did not merge with the MSA and was not superseded by the MSA. We agree that the MSA preserved Mat Shah's rights to enforce the consent judgment in the event there was a default under the MSA.
- I [67] Clearly, there was default under the MSA as the preference shares in Solaris were not issued. We disagree that there was no timeline to do so. On the contrary the MSA had clearly set out the timeline which was not complied with. Indeed, there was no issuance of any preference shares whether within time or out of time.

[68] As we said earlier, the settlement agreement, the consent judgment, the personal guarantee and the MSA cannot be read in isolation. They have to be read together. It is clear from our reading of these documents that the sole purpose of these agreements was to ensure that the judgment sum was returned to Mat Shah. That did not happen. Then came the MSA. Under the MSA, preference shares in Solaris were to be issued in tranches to Mat Shah and there was to be a buy-back to the value of RM2,950,000. There was a timeline (per cl 2(a)(ii) of the MSA) for the issuance of the preference shares. There is no evidence or even a suggestion that the MSA had been complied with. The MSA had stipulated the consequences that are to follow if there was a breach thereunder. Since the preference shares were not even issued, it is clear that there was a breach of the MSA. It was then open to Mat Shah to enforce the consent judgment. And that is exactly what he did by way of the statutory notice.

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[69] At the risk of repetition, we reiterate that the MSA per Recital L and cl 3.1(i), (ii) and (iii), expressly preserved Mat Shah's right to enforce the consent judgment.

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[70] Thus, any which way that one looked at the consent judgment and/or the MSA, it is clear and unambiguous that the MSA did not supersede the consent judgment and neither had the latter merged with the former. The consent judgment, the MSA and indeed the other contemporaneous agreements (the settlement agreement and the personal agreement) made it crystal clear that the party who was to receive the judgment sum was Mat Shah. But in opposing the amended petition, Solaris appear to be arguing that it has not been proven that SPKL had approved the arrangement as per the consent judgment whereby Mat Shah alone was to receive the judgment sum.

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[71] In our view, it is not for Solaris to raise the issue. If at all, it should be SPKL to take issue with this. But the reality is that Mat Shah and his son are the only shareholders of SPKL. It is therefore questionable whether Solaris even has the requisite locus standi to raise this as an issue.

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[72] Since all sides were legally represented and it was agreed all round that the judgment sum was to be paid to Mat Shah, we do not see how Solaris can raise this as an issue in an attempt at preventing the winding up order from being made. Any query or issue as regards the position of SPKL should have been taken up prior to the consent judgment being recorded. In our view, it is way too late in the day for Solaris to be bringing up these matters.

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[73] Hence, to recapitulate, it is our view that there was a breach of the MSA, and Mat Shah's right to enforce the consent judgment were at all times

A preserved under the MSA. And as agreed per the consent judgment, the judgment sum was payable to Mat Shah alone.

B [74] On that premise, it is clear that under the consent judgment, Solaris is liable to pay the judgment sum to Mat Shah, and Solaris has not established any bona fide dispute in regards to their indebtedness for the amount as stated in the statutory notice, ie RM 3,681,035 (being RM2,950,000 with interest thereon calculated from 22 April 2013 to 4 August 2018 — RM731,035) which was due and payable by Solaris to Mat Shah. As such, since Solaris failed to pay the said sum within the period of 21 days after service of the statutory notice, a presumption of their inability to pay their debt (insolvency) arose under s 466(1)(a) of the Companies Act 2016 which entitled the High Court to make a winding up order pursuant to s 465(1)(e) of the Companies Act 2016.

D [75] Hence, in so far as Appeal 1100 is concerned, for the reasons as stated above, we are of considered view that there was no misdirection or any appealable error which warranted appellate intervention. Therefore, Appeal 1100 is dismissed with costs of RM10,000 (subject to payment of allocator) and the High Court decision dated 9 May 2019 is affirmed. In so far as Appeal E 1009 is concerned, following the order made in Appeal 1100, we hereby make a consequential order that Appeal 1009 be accordingly dismissed with costs of RM10,000 (subject to payment of allocator) and the decision of the High Court dated 9 May 2019 is affirmed.

F *Appeal 1100 and Appeal 1009 dismissed.*

Reported by Nabilah Syahida Abdullah Salleh

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